Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

Adam Steele, et al.,

*Petitioners,*

v.

City of Bemidji, et al.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

## PETITION FOR WRIT OF CERTIORARI

**Adam Steele,**
**Petitioner pro se**
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**Bemidji, MN 56619**
**218-759-1162**

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## A. QUESTIONS PRESENTED FOR REVIEW

1) Where a corporation is closely-held and almost wholly owned by it's Chief Executive Officer; is without means to obtain counsel to proceed before federal courts; and where its cause of action is so closely linked to that of an individual Plaintiff, namely its CEO, properly appearing before the Court, so as to render the causes of action of these two parties Plaintiff, as a practical matter, inseverable; may said corporation, in these extraordinary circumstances, maintain its case before the federal courts by the appearance of its CEO?

2) May the causes of Petitioner Northern Herald Publications, Inc., be maintained by Petitioner Adam Steele as a shareholder's derivative action under FRCP Rule 23.1?

2) Does the doctrine of *absolute immunity* protect a prosecutor from claims under *42 USCS 1986*?

3) Does the Sherman Anti-Trust Act (15 USCS 1, et. seq.) preclude a concerted boycott action by individuals and retailers (rather than direct competitors of the affected party) designed to limit commerce by the Petitioner in the Bemidji and Park Rapids and other areas and effectively make the Petitioners' product, a newspaper known as Northern Herald, unavailable to those of the public who wish to buy it in said areas?

4) In the instance of either an intentional, or a de facto, combination restraining trade, or restraining freedom of speech or of the press, would injunctive relief be appropriate and available?

5) Is the action of the "non-government Defendants" (10-31, inclusive, Parties, post) sufficiently tied to the actions of

the "City Defendants" (1-6 inclusive, Parties, post) which actions have already been held unconstitutional, and to the "County Defendants" (7-9, inclusive, Parties, post), to render them culpable under 42 USCS Sec. 1983 and/or Sec. 1985?

6) Did a conspiracy to deny civil rights, as defined by 42 USC 1985(3), exist?

7) Does 42 USC § 1985(3) require "class-based animus" to permit action thereunder?

8) Did the actions of the County Defendants rise to the level of neglect of duty to prevent conspiracy, actionable under 42 USC 1986?

9) Are private retail newsstands, as in grocery and convenience stores, and restaruants open to the public and selling a variety of periodicals; and free newsracks in restaurants and other places open to the public, "public places" for exercise of First Amendment rights?

## B. LIST OF THE PARTIES

The following is the list of parties to the orginal proceeding in the Federal District Court of the District of Minnesota, and later before the United States Court of Appeals for the Eighth Circuit, the judgements of which Courts are sought, now, to be reviewed:

Plaintiffs:

1) ADAM STEELE, an individual, and
2) NORTHERN HERALD PUBLICATIONS, INC., a Minnesota corporation.
CORPORATE DISCLOSURE: There is no parent corporation of this corporation, nor any publicly-held corporation owning 10% or more of said corporation's stock.

Defendants:

1) THE CITY OF BEMIDJI, MINNESOTA, A Municipal Corporation,
2) ALAN FELIX, individually, and as City Attorney of the City of Bemidji, Minnesota,
3) PHIL SHEALY, individually and as City Manager of the City of Bemidji, Minnesota,
4) Sergeant MICHAEL PORTER, individually, and as an officer of the Bemidji Police Department,
5) JON HUNT, individually, and as an officer of the Bemidji Police Department,
6) ROBERT TELL, individually, and as Chief of Police of the City of Bemidji, Minnesota,
7) TIM FAVER, individually, and as County Attorney, County of Beltrami, Minnesota,
8) DAVID FRANK, individually, and as Assistant County Attorney, County of Beltrami, Minnesota,
9) COUNTY OF BELTRAMI, State of Minnesota,

10) LYNETTE RUSSELL aka LYNETTE REX, an individual,
11) DEVELOPERS' DIVERSIFIED REALTY CORPORATION, an Ohio corporation dba PAUL BUNYAN MALL, Bemidji,
12) JOHANNESON'S, INC., A Minnesota Corporation,
13) RICH JOHANNESON, individually,
14) JOSEPH LUEKEN, dba LUEKEN'S FOOD STORES,
15) WILLIAM BATCHELDER, individually,
16) TERRY SMART, an individual,
17) FORUM COMMUNICATIONS COMPANY, A North Dakota Corporation,
18) OMAR FORBERG, individually,
19) STEVE MICHAELS, dba SUPERAMERICA OF PARK RAPIDS,
20) The elusive and evasive entity which is doing business as PETRO PETES'S, Park Rapids, (which, since the original filing of the Complaint, appeared and has been identified as Western International Trading Company, a corporation),
21) J & B FOODS, INC., A Minnesota Corporation,
22) RON DARGIS, dba RON'S FOODS, dba FESTIVAL FOODS,
23) COOPERATIVE SAMPO, INC., A Minnesota Corporation, dba CENEX, Park Rapids,
24) JEFF WIZNER and MRS. JEFF WIZNER, dba COUNTRYSIDE RESTAURANT, Blackduck, Minnesota,
25) JACKIE HALL, dba COUNTRYSIDE RESTAURANT, Bemidji, Minnesota,
26) JUDY BLACK, dba MAID-RITE CAFE, Bemidji, Minnesota,
27) SHARI MISTIC, dba SOUTHSIDE RESTAURANT, Bemidji, Minnesota,
28) TIM SAGA, individually,
29) SAGA OF BEMIDJI, INC., A Minnesota Corporation, dba HIGHWAY HOST RESTAURANT, Bemidji, Minnesota,
30) KITTY LEMMER, an individual,

and
31) other unnamed persons and entities.

DISINTERESTED PARTIES:

Petitioners name the following as disinterested parties in this Petition:

Defendants 1-6, inclusive, above; for reason that Petitioners' cause against these Defendants has been remanded, by the United States Court of Appeals, to the District Court for trial, and Petitioner does not seek Certiorari, herein, on that part of the Judgment of the said Appellate Court as it relates to said Defendants; and

Defendant 30, above, who is deceased and against whom Petitioners do not proceed, before this Court, in the instant case.

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## D. CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

1) 11/19/99 - (District Court Case No. 99-CV-1862 RHK/RLE) MINUTES: (Judge James M. Rosenbaum/Anderson, Dawn) That Plaintiff's motion for a TRO is granted; Plaintiff may distribute material [not less than] five feet from the door of the [Bemidji] post office; Plaintiff may not block access to public places; bond posted in the amount of $5. [entry date 11/22/99]

2) 11/23/99 - ORDER (Judge James M. Rosenbaum / 11/23/99) that: 1. Plaintiff's motion for a temporary restraining order is granted, subject to the conditions set forth at the hearing; 2. Plaintiff is ordered to pay a security bond to the clerk of court for this district in the amount of $5.00, pursuant to Rule 65(c). [Entry date 11/26/99]

3) 12/21/99 - PRETRIAL NOTICE ORDER (Magistrate Judge Raymond L. Erickson / 12/21/99); pretrial status conference set for 10:30 am, 1/25/00, in Duluth, MN.

4) 01/26/00 - PRETRIAL ORDER (Magistrate Judge Raymond L. Erickson) final dates for: amended complaint set for 5/1/00; discovery set for 10/1/00; non-dispositive motions set for 11/1/00; dispositive motions set for 12/1/00; ready for trial set for 12/1/00.

5) 01/26/00 - ORDER (Judge Richard H. Kyle) Referring to Magistrate Judge Raymond L. Erickson motion to dismiss for a report and recommendation.

6) 02/24/00 - MINUTE ORDER (Magistrate Judge Raymond L. Erickson) Granting plaintiffs' motion for leave to amend complaint.

7) 04/05/00 - ORDER (Judge Richard H. Kyle) That all dispositive motions (filed and to be filed) are referred to Magistrate Judge Raymond L. Erickson for hearing and a report and recommendation.

8) 04/06/00 - MINUTE ORDER (Magistrate Judge Raymond L. Erickson) granting plaintiffs' motion for additional time for service of summons and the plaintiffs shall have 30 days from the date of this Order to effectuate service upon the remaining unserved defendants.

9) 08/03/00 - ORDER (Magistrate Judge Raymond L. Erickson) the Russel defendants' motion for monetary sanctions is DENIED.

10) 08/03/00 - REPORT AND RECOMMENDATION (to Judge Richard H. Kyle) (Magistrate Judge Raymond L. Erickson) 1. That Forum's motions to dismiss be granted. 2. That J&B's motion to dismiss be granted. 3. That Petro's motion to dismiss be granted. 4. That the Beltrami defendants' motion to dismiss be granted. 5. That the Russell defendants' motion to dismiss be granted. 6. That Johanneson's motion to dismiss be granted. 7. That Developers Diversified Realty Corporations's motion to dismiss be granted. 8. That the Bemidji defendants' motion to dismiss, or in the alternative, for summary judgment be granted. 9. That Superamerica's motion to dismiss be GRANTED. 10. That the Injunction, which was issued by the District Court on 11/19/99 be summarily dissolved. (In brief, that claims against all defendants be dismissed; that summary judgement be alternatively granted as concerns the "Bemidji Defendants" (defendants 1-6, inclusive, in list of Parties, ante); and that the Temporary Restraining Order of 11/19/99 be dissolved.)

11) 08/29/00 - ORDER (Judge Richard H. Kyle) overruling

objections, adopting report & recommendation, granting motions to dismiss and for summary judgment, granting Superamerica's motion to dismiss; the injunction issued by the District Court on 11/19/99 is dissolved; and the complaint is dismissed with prejudice.

12) 07/30/01 - JUDGMENT (United States Court of Appeals for the Eighth Circuit; Judges Morris Sheppard Arnold, Richard S. Arnold and Fagg) (Appellate Case No. 00-3348MN) Reversal of summary judgement previously granted for the "City defendants" (Defendants 1-6, inclusive in the list of Parties, ante) and remand to the District Court as regards claims against said "City Defendants"; judgment of District Court affirmed in all other respects.

## E. BASIS FOR JURISDICTION

1) The judgment sought to be reviewed was entered by the United States Court of Appeals for the Eighth Circuit on July 30, 2001. No rehearing was sought by any party.

2) Jurisdiction to review, on writ of certiorari, the judgment is conferred upon the United States Supreme Court by 28 United States Code Sec. 1254 (1).

## F. CONSTITUTIONAL AND STATUTORY PROVISIONS

Text of cited provisions is contained in Appendix, post.

1) The First Amendment to the United States Constitution;
2) The Fourteenth Amendment to the U. S. Constitution;
3) United States Code, Title 42, § 1981;
4) United States Code, Title 42, § 1983;
5) United States Code, Title 42, § 1985;
6) United States Code, Title 42, § 1986;
7) United States Code, Title 42, § 1988;

8) United States Code, Title 15, §§ 1, et. seq.;
9) United States Code, Title 15, § 15.
10) Federal Rules of Civil Procedure, Rule 23.1
11) United States Code, Title 28, § 1653
12) United States Code, Title 28, § 1654

## G. STATEMENT OF THE CASE

*Asterisk denotes those facts (parenthesized) which were not, at time of dismissal, part of the record, but which could have been shown on discovery or at trial, had the case been allowed to proceed.

Steele and Northern Herald, Inc., filed a First Amended Complaint naming the City of Bemidji, City Attorney Alan Felix, City Manager Phil Shealy, Chief of Police Robert Tell, and Police Officers Michael Porter and Jon Hunt (the "City defendants"); the County of Beltrami, County Attorney Tim Faver, and Assistant County Attorney David Frank (the "County defendants"); and twenty-one private individuals and businesses (the "non-government defendants").

The Northern Herald is a periodical containing political reporting, other news, and advertising. Petitioners publish the Northern Herald and have three primary means of distribution: for-profit sales through existing retailers, complimentary distribution, and direct curbside sales on public streets and sidewalks.

In early January 1998, only days following an article appearing in the Northern Herald critical of one Richard Morton, then recently deceased, Petitioner Steele was contacted by Defendant William Batchelder (Morton's nephew) and told of a combination of several persons, who were not then identified, who were acting in groups to suppress distribution of the Northern Herald. (Steele told Batchelder that he intended to pull the current issue of Northern Herald from the shelves where it was sold or

distributed, republish it without the offending article, and publish a retraction of the offending article. These things were done.*) Nonetheless, within days after the said conversation with Batchelder, all of the retailers who had theretofore sold the Northern Herald in Bemidji terminated their agreement to do so and refused to carry the paper; many establishments which had allowed complimentary copies on their premises also now refused same. Some of said retailers claimed to have been pressured by unidentified persons and threatened with group boycott. This left Northern Herald, effectively, without mode of distribution in Bemidji, excepting for the few complimentary locations that remained, and curbside sales.

(*Because the complimentary stacks are not inventoried, nor secured by the establishment having them, unlike the stacks at sale locations, and despite the wording, "1 per person," appearing on said copies, the complimentary copies are prone to theft of the entire stacks of them by persons seeking to keep the paper from public circulation. For this reason, complimentary distribution, alone, is inadequate to practically enable people wanting the paper to obtain it. Also, with complimentary stacks, as the copies are free, the demand is high but the supply of copies which can be so provided is limited by economics. Unlike the sale locations, which, being paid, can be restocked to meet whatever demand presents itself, the limited number of complimentary copies deplete quickly. Again, this makes the complimentary distribution method, if used alone, inadequate to ensure that most people who would want to obtain a paper can do so.)

(*In the theft of stacks of complimentary copies, it is rare to be able to identify a perpetrator), nonetheless, this was done in summer, 1998 by an eyewitness. After Steele notified City police of the theft, by Defendant Lynette Russell, of a stack of complimentary Northern Herald newspapers from a local business, the police merely referred the matter to the

County Attorney's Office, which refused to prosecute the theft. Although this matter was not generally publicized, within days, Respondent Batchelder evidenced awareness of same (Affidavit of Adam Steele of June 2000, in the District Court file and excerpted in the appendix hereto).

In February 1998, Steele was distributing papers near a mall, when a police officer ordered him to stop doing so. Steele discussed the matter with the City Manager, who (after a discussion with the Chief of Police) confirmed that Steele could not sell the Northern Herald at that location. By summer, 1998, after Steele complained to the City, he received a letter from City Attorney Felix stating that Steele's use of public property to "advertise and sell [his] alleged publication" without a solicitation permit and an obstruction permit violated, respectively, City Code sections 6.39 and 10.31. Felix explained that a section 10.31 permit was conditioned upon the provision of adequate insurance and bond, and that in light of Steele's recent bankruptcy, the City was concerned with his ability to provide adequate financial security. Felix warned Steele that the City would require "at a minimum public liability coverage with policy limits equal to those required of the City," and that given Steele's "past history of non-payment, a substantial bond [would be] mandatory." Finally, Felix pointed out that a violation of either ordinance was a misdemeanor and suggested that Steele, find "willing local, private outlets" to distribute his paper, commenting that "in light of this community's apparent unwillingness to embrace your ideas, another option may be your consideration of relocation to another community ... more willing to embrace your way of thinking."

Several days after receiving Felix's letter, Steele was standing by the sidewalk in front of the Bemidji Post Office—giving away copies of the Northern Herald, and wearing a sign that said "FREE – TODAY ONLY"—when a City police officer threatened to arrest him for "soliciting." Steele

responded that he was giving, not selling, the paper; the officer said he would discuss the matter with Felix and then take Steele "to jail, today" if appropriate. Steele stopped distributing the paper and called Felix, who concurred with the police officer because distributing the paper from the sidewalk violated the City's "obstruction" ordinance (even though Steele had been holding all of the copies, and had not deposited them on public property). City officials continued to threaten to arrest Steele if he distributed the paper on public property in the City without first obtaining the requisite solicitation and obstruction permits.

Petitioners' First Amended Complaint further alleges that business owners had denied service to Steele at restaurants and bars, a landlord had threatened a tenant (a friend of Steele's) with eviction if the tenant continued her relationship with Steele, and that the only commercial printing press in the Bemidji area (Forum Communications and Omar Forberg, Defendants 17 & 18 in Parties, ante) , which holds itself out to do commercial web (newspaper) printing, following a conversation with Ratchelder (See Affidavit of Adam Steele of June 2000, in the District Court file and appendix hereto), refused to print the Northern Herald.

Upon defendants' motions to dismiss or for summary judgment, the District Court held that (1) Steele (a non-lawyer) could not represent the Northern Herald in these proceedings; (2) Steele failed to state a claim against the non-government and County defendants; and (3) City defendants were entitled to summary judgment because the City ordinances were constitutional, and because the individual City defendants were entitled to qualified immunity. The temporary restraining order, issued 11/19/99, and allowing Steele to distribute Northern Herald on the public sidewalk in front of the post office at Bemidji, was dissolved by the District Court. See Steele v. City of Bemidji, 114 F. Supp. 2d 838 (D. Minn. 2000).

An appeal followed, in which the United States Court of Appeals for the Eighth Circuit reviewed de novo both the District Court's grant of the motions to dismiss and its grant of summary judgment.

On July 30th, 2001, said Court of Appeals, by the Honorable Richard S. Arnold, Circuit Judge, issued its opinion and judgment reversing the District Court's grant of summary judgement as to Steele's First Amendment claims against the "City Defendants" (1-6, inclusive, in Parties, ante) remanding said cause back to the District Court, and in all other respects, affirming the judgment of the District Court.

The Appellate Court agreed in the dismissal of all claims which might have been maintained by Petitioner, Northern Herald Publications, Inc. because said Petitioner was not represented by counsel, and held that Petitioner Adam Steele "does not have standing to raise any possible claims by the Northern Herald in this regard."

2. The basis for jurisdiction of the Court having original jurisdiction (i.e. the United States District Court for the District of Minnesota) in this matter is United States Code, Title 28, Section 1331. Venue was proper under United States Code, Title 28, Section 1391 (b) & (c).

## H. ARGUMENT

1. OVERVIEW. This Writ of Certiorari should be allowed under Supreme Court Rule 10, as it involves an important question of federal law that has not been, but should be, settled by this Court.

Essentially, it involves whether a group of retailers, aided by a municipality and its law enforcement officers, and by a county prosecutor, by the collateral actions of same, has the right to discriminate against a publication, creating, with the aid of said collateral actions, a de facto citywide ban on said publication keeping same from the citizens of said municipality and in so doing, not only infringing the right of said publication to circulate, but also, and very importantly, the right of the interested citizens to obtain the publication.

In this, the retailers (defendants) have asserted their private property rights, which the Plaintiffs acknowledge and, generally, strongly support. Plaintiffs, however, assert that, historically and in many other cases, it has been found that situations can arise where certain rights of various parties can be in conflict and the Court has historically sought to find a balance. By way of example, a restaurateurs' property rights do not extend to allow him to exclude people of color from his establishment, or provide them a differing standard of service. That would conflict with other law. Similarly, the exclusion, by a number of merchants in a certain locality, of the sale of a certain publication from their establishments, whether in an intentional conspiracy or simply what amounts to, due to the number of merchants so acting (in this case, all of them), a de facto restraint of that publication in the said locality conflicts with one of our nation's oldest laws, i.e. the First Amendment to the United States Constitution, as it has been wisely interpreted by the federal Courts.

In such a situation, even if damages could not be shown,

injunctive relief (also prayed for in the First Amended Complaint) would be necessary to restore the availability of the press, which was the intent of said Amendment and necessary under same.

". . . liberty of circulating is as essential to that freedom [of the press] as liberty of publishing." Lovell v. City of Griffin, Calif. 58 S. Ct. 666, 303 U.S. 444; Const. Amends. 1, 14

For these reasons, if no other, the District Court erred in granting dismissal for the various defendants.

2. SPECIFIC CONTENTIONS.

a) Absolute Immunity as Concerns "County Defendants."

In regard to the question of law concerning absolute immunity of prosecutors, with relation, specifically, to 42 USCS 1986, Petitioner is not aware that this Court has ever approached that question, and asks that the Court consider it now.

In this, Petitioner acknowledges that the doctrine of absolute immunity for prosecutors, particularly as regards failure to prosecute, is well settled, as regards most statutory provisions regarding liability. Petitioner contends that in the case of a statute such as Sec. 1986, however, which specifically addresses neglect of duty to prevent conspiracy to deny civil rights, to apply absolute immunity here in favor of those directly charged with the primary duties of law enforcement, i.e. police and prosecutors, would, to a large extent, "gut" the statute. It would enable said officers to perpetuate a conspiracy by non-prosecution and failure to make arrests. Petitioner contends that the District Court erred in that its dismissal for the "County Defendants" (7-9, inclusive in Parties, ante) came too soon. While the Appellate Court held that failure to prosecute in a single instance of theft of a nominal stack of newspapers does not meet the muster to establish cause of action, discovery and trial might have shown 1) that, in the Beltrami County jurisdiction, it is not uncommon for theft of as little as a pack of fishhooks,

worth less than two dollars, to be prosecuted; so the failure to prosecute for the theft of copies was unusual for the jurisdiction and denied Petitioners equal protection under the laws, 2) that there have been several other incidents where Bemidji city, and Beltrami County prosecutors have failed to prosecute for crimes committed against, or reported by, the Petitioners; further, that the Petitioner Adam Steele, when, although infrequently, accused of a petty crime, has been, by same prosecutors, prosecuted vigilantly with harsh penalties sought (that, in the instant case, Petitioner Adam Steele was threatened with being immediately *taken to jail* for alleged violation of two relatively minor city ordinances is case in point); and that all of these actions and omissions, taken together, establish a pattern, and 3) that in the context of collateral actions, occurring within the same time period, by the "City Defendants" (1-6, inclusive, Parties, ante) which have been recognized by the Appellate Court as unconstitutional and devised to be a prior restraint on the Petitioners' First Amendment rights, and the collateral actions of the other defendants herein, the failure of the "County Defendants" to prosecute denied Petitioners equal protection under the laws, and furthered a conspiracy, by several parties, to deny First Amendment rights by, effectively, allowing, and letting it be known within the community that there would be practical impunity for the theft of stacks of copies of the subject newspaper; thusly defeating this lawful mode of distribution of same.

Further authority regarding absolute immunity, and further discussion of why a narrow exception to same should be carved out here may be found in the *PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS COUNTY OF BELTRAMI, FAVER & FRANK'S MOTION TO DISMISS* of April 21, 2000, filed with the District Court. To avoid redundancy, and in compliance with the conciseness requirement of Rule 14, this voluminous document is not replicated here.

Petitioner reiterates that even if absolute immunity was held to preclude recovery of damages, cause for injunctive relief as prayed for in the First Amended Complaint (paragraph 2. of the prayer, p. 22 of the First Amended Complaint) would remain (See Black Brothers Combined, Etc. v. City of Richmond, 386 F. Supp. 147 (1974), citing the U.S. Supreme Court in Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)); thus the granting of total dismissal against the County Defendants on that basis was in error.

b) Non-Government Defendants.

That the actions were within a combination known to the Parties is corroborated by the statements to Petitioner Adam Steele, by Respondent William Batchelder, early in the conspiracy, wherein Batchelder reported to Steele that many groups of persons were acting in many ways to defeat the business of the Northern Herald in Bemidji, and further by his knowledge of the matter of the thefts of stacks of copies, which, in the end, would not be prosecuted. (Para. V.-VII., inclusive, of *Affidavit of Adam Steele Accompanying Combined Memorandum in Opposition to Motions to Dismiss*, of June, 2000, in the District Court file, and in the Appendix hereto.)

Had the motions to dismiss not been granted by the District Court, discovery might have also shown that attorney Carl Drahos, attorney for many of the Respondents herein before the District and Appellate Court, was, in early 1998, one of the first signers of petitions encouraging the pressure boycott, among retailers, of the Northern Herald, which encouragement involved threats against those merchants if they continued to carry the newspaper.

Again Petitioners assert that this case is worthy of the Court's consideration as it deals with an important matter of public policy in that, in the instance of the circumstances that have, in the instant case, come to pass, it has been demonstrated that it is possible, in a small and closely-knit

community, for a group of influential individuals, with the acquiescence of City and County officials, to actually stop the distribution of a periodical in that community, notwithstanding whether or not others in that community would like to receive it, and notwithstanding the rights of those others, nor those of the writers and producers of, nor advertisers in, said periodical.

This concerted action constitutes a prior restraint of protected free speech. The actions of individual "non-government" defendants (10-31, inclusive, Parties, ante), however, would not have been nearly as effective without the assistance of the County and the City. It would have been futile to try to stop the circulation of the subject newspaper in Bemidji if the curbside vendors were left in place, i.e. if they had not been threatened by the City with arrest; similarly, the unlawful purpose could not have been achieved if the free distribution stacks continued, i.e. if it had not become known that they might be stolen with impunity. For these reasons, the actions of the individual defendants involved must be viewed as closely enough in combination with official actions and omissions, to render the individual defendants civilly culpable as "state actors" and liable under 42 USCS 1983 and 1985.

The actions, in combination, of the Defendants, Petitioner has maintained, also constitute a violation of the Sherman Anti-Trust Act (15 USCS Sec. 1) for which damages are recoverable under 15 USCS Sec. 15. There are many authorities rendering group boycotts illegal per se under said act. Again, even if intentional combination could not be shown at trial (which Petitioner does not concede), and even if damages were not recoverable, still, there would remain a cause of action for injunctive relief as prayed in the First Amended Complaint, to stop a de facto combination in restraint of trade, as well as restraining the freedom of speech and of the press in Bemidji, Park Rapids, and other areas cited in the documents filed before

the District Court. For this reason, if no other, the total dismissal of these claims, by the District Court, was in error.

Further authority regarding, and discussion of the points substantiating these arguments are contained in the *COMBINED MEMORANDUM OF PLAINTIFF IN OPPOSITION TO MOTIONS TO DISMISS* of June 19, 2000 and the affidavits and exhibits accompanying same, filed with the District Court. To avoid redundancy, and in compliance with the conciseness requirement of Rule 14, these voluminous documents are not replicated here.

c) Claims of Northern Herald Publications, Inc.

The claims of Petitioner, Northern Herald Publications, Inc. ("Northern Herald"), have been dismissed by the District and Appellate Courts because it did not have counsel in the earlier proceedings, nor does it at this time. The First Amended Complaint alleges, "... ADAM STEELE is the Chief Executive Officer and major stockholder of Plaintiff Northern Herald Publications, Inc." The affidavits filed, and oral argument presented, before the District Court tended to show that Steele had made serious and diligent efforts to obtain counsel for said corporation, but was unable to procure same due to inability of said corporation to pay a retainer, and not being able to find counsel willing to take the complex case on contingency fee basis. This is so, notwithstanding the statement, on p. 9 of the District Court's (Magistrate Erickson's) Report, that "Steele has failed to retain legal counsel, on Northern Herald's behalf, not because of any financial hardship ..."

It is well established that a person may represent his own interests before the Court, as well as his interests in a derivative shareholder action where the corporation cannot represent itself.

i) The facts of this case, as they were presented to the District Court, were such as to indicate that . . the causes pled, on behalf of Northern Herald, could have taken the form of a *shareholder's derivative* action. Although it is now

known that the pleadings in the First Amended Complaint, are deficient as regards shareholder's derivative action under FRCP 23.1; all of the necessary conditions to plead per said Rule, in fact, exist; and said Complaint could be amended to contain allegations of same, pursuant to 28 USC § 1653 (which allows pleadings to be amended, for defective allegations of jurisdiction, in the trial or appellate courts) or other applicable authority permitting same. The Appellate Court was accurate in finding that Petitioner Steele did not seek leave to amend in this regard, as he was unaware that same would be necessary; Petitioners seek such leave now, as a part of any final order that this Court may deem just.

ii) Alternatively, in the instant case, the interests, rights and profits of Northern Herald are so closely tied to those of Steele, from both a First Amendment (as Steele's writing appears primarily in the Northern Herald newspaper), as well as a financial, perspective, that in order to show the damages which accrued to him, Steele would have to demonstrate the damages that accrued to Northern Herald. In this regard, justice would dictate that Steele be allowed, if not actually to represent Northern Herald for its benefit, then to present the case for damages accruing to Northern Herald, to be utilized, in the instant case, for ultimately determining the total damages to Steele as a result of the Defendants' acts and omissions which firstly damaged Northern Herald. Put briefly, to dismiss a cause on the theory that it only affects Northern Herald would be in error because any action damaging Northern Herald also directly damages Steele.

iii) In the Matter of Holliday's Tax Services, Inc., 417 F. Supp. 182 (1976), a federal court said, validly, "A person's day in court is, however, more important than the convenience of the judges. ...To require this corporation to appear by a lawyer is effectively to exclude it and its sole shareholder from the courts. Were counsel freely available to lower and middle income persons in civil cases, the traditional rule requiring corporations, whether large or

small, to appear by a lawyer would work no hardship. ... [quoting A. Victor & Co. v. Sleininger, 255 App. Div. 673, 676, 9 N.Y.S.2d, 323, 326 (1939)] In our opinion, an argument on the other side far outweighs those mentioned above. It appears when we ask ourselves this question: Suppose a corporation were too impoverished to employ a lawyer to defend it, or suppose it had a large claim it believed to be just but could find no lawyer to take the case, believing it to be hopeless, should the corporation be denied its day in Court? ... " Petitioners submit that the instant case, as it deals with important civil rights and public policy issues, asks these questions.

d) Does 42 USC § 1985(3) require "class-based animus" to permit action thereunder?

A long-standing first rule of statutory construction is that a statute means what its words say. Nothing in § 1985(3) requires class-based animus. The statutes says, "If two or more persons . . . conspire . . .for the purpose of depriving . . . any *person* or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, . . . the party so injured or deprived may have an action for the recovery of damages . . . ." [emphasis added.]

Petitioners note that the language of the statute, as regards the existence of a class aggrieved, is permissive, not mandatory.

Petitioners assert the words of the Honorable Justices O'Connor and Blackmun in Bray v. Alexandria Women's Health Clinic, (1993) 113 S. Ct. 753, at 803, wherein said Justices wrote, in dissent, "The distinction in choice of words ['deprive' rather than 'deny'] is significant in light of the interrelated objectives of the two provisions. The Fourteenth Amendment protects against state action, but it 'erects no shield against merely private conduct, however discriminatory or wrongful.' Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 842, 92 L. Ed. 1161 (1948). Section 1985(3), by contrast, was 'meant to reach private action.' Griffin ... [v.

Breckenridge] 403 U.S. at 101, 91 S. Ct., at 1798. Given that difference in focus, I would not interpret 'discriminatory animus' under the statute to establish the same high threshold that must be met before this Court will find that a State has engaged in invidious discrimination in violation of the Constitution."

In ways, certain elements of the instant case bear a resemblance to Bray, in that there clearly exists, in both cases, invidious animus. In both cases, a deciding point turned on the question of whether it was class-based, notwithstanding that the statute doesn't require that to be actionable. In the instant case, the animus was simply to stop the circulation of a newspaper; in Bray, it dealt with the right of accessibility to abortion. In both cases, the entities seeking redress of infringement of constitutional rights were defined by their lawful - although to some, unpopular - actions under the Constitution, rather than by color, ethnicity, or other physical characteristic.

In this instance, the Constitutional freedom sought to be protected is very important; it involves the cornerstone of American liberty - the freedoms guaranteed by the First Amendment - which when usurped, would not give rise to an identifiable class, as heretofore defined by the Courts, but which, nonetheless, are worthy of protection. Again, Petitioners, cite the Honorable Justices O'Connor and Blackmun, in Bray, supra, 113 S. Ct. at 804, writing, "Private actors acting in groups can be as devastating to the exercise of civil rights as hostile state actors, and they pose an even greater danger because they operate in an unregulated realm divorced from the responsibilities and checking functions of government."

Petitioners now ask this Court to consider whether it's previously settled, in certain cases, requirement of class-based animus, if applied in all cases and in all ways, serves the intended purpose of § 1985(3); and also whether the extensions of law contemplated by the wording of § 1988

(a) which, in order to work the spirit of civil rights statutes, says: "in all cases where they [the laws] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law ... shall be extended to and govern the said courts . . . ." might justify a departure from the standard used in previous cases dealing with other, and different types, of civil rights where a class-based animus might be more readily discernible.

e) Do retailers' newsstands constitute "public places" for exercise of First Amendment rights as they relate to availability of a newspaper in said places?

There is no question as to the importance of private property rights. Still, for the public benefit, those rights have historically had to be balanced with public policy objectives. An establishment open to the public may not discriminate in the classes of people it serves in violation of federal law; similarly there are many other areas where a balancing of rights has been necessary, e.g. a business owner may be required to devote a certain amount of parking for handicapped individuals, in certain localities he may be restricted from displaying tobacco and smoking articles in certain manners, and those who sell alcohol are restricted, usually by state laws, in the most stringent ways as to where, when and in what manner the product may be sold, and how the premises may be conducted. Clearly, a minimally-intrusive governmental presence to achieve a desired public purposes and protect public interests and rights, in private business, is nothing novel.

Nor is it new for the Court to recognize the occasional need for the protection of First Amendment civil rights on private property. In Amal. Food Emp. U. Loc. 590 v. Logan Valley Plaza, 88 S. Ct. 1601, (1968), the Court held that where the private property assumes to some significant degree the functional attributes of public property devoted to public use, then the property owner might become subject to the commands of the First Amendment; that [at 1612, citing

Marsh v. State of Alabama, 326 U.S. at 506, 66 S. Ct. at 278] "Ownership does not always mean absolute dominion, and the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by statutory and constitutional rights of those who use it." In this, the Honorable Justice Douglas concurred, his comments indicating that he saw the injustice, "... to make 'private property' a sanctuary from which some members of the public may be excluded merely because of the ideas they espouse. ..."

Whereas, in Logan, (88 S. Ct. at 1609) the functional attributes were that "the shopping center serves as the community business block [citing Marsh, supra, 326 U.S. at 508, 66 S. Ct. at 279] 'and is freely accessible and open to the people in the area and those passing through, ....'"; similarly, here, the retail establishments owned by the Defendants are also accessible and open to the public. Due to the size and diversity of merchandise now sold by the Defendants who are grocers, and the nature of the Defendant who operates a shopping mall, their stores and establishments have assumed the functional attributes of a town square, community business block or similar public place where newspapers might be publicly sold; the newsstands (i.e. in the Defendants' grocery stores and restaurants) have, to a large degree, replaced the news vendors who might have operated in the aforementioned public places. In this way also, said privately owned newsstands, in Defendants' stores and restaurants, being places where First Amendment rights are routinely expressed, have particularly assumed functional attributes of a public place.

Of note is that the subject matter of Logan was the presence of pickets in a privately owned shopping center - something far more intrusive into the private property than in the instant case where we are concerned merely with the leaving of newspapers for sale in those areas of stores and restaurants (owned by the Defendants) which are devoted to the display,

availability and sale of newspapers.

In recent times, there have been cases, notably involving other First Amendment conduct in shopping malls and the like, where *certain* conduct has been constrained or prohibited; these decisions do not run contrary to, but rather well in accord with Logan, supra, (88 S. Ct. at 1609) which said, "the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it."

That circumstance, however, does not appear in the instant case, which involves putting a newspaper on publicly open newsracks; a circumstance more in line with the holding, again in Logan (88 S. Ct. at 1609) that "the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises and for a purpose generally *consonant with the use to which the property is actually put.*" [emphasis added.]

f) Malicious Interference with Business Advantage.

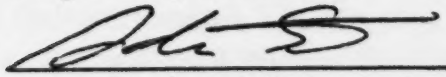
Petitioners contend that the actions of the Defendants herein constitute Malicious Interference with Business Advantage (a civil tort in Minnesota) as set forth in paragraph LXI. of the First Amended Complaint.

g) Summary - Effect of 42 USC §§ 1981, 1988

Petitioners maintain that 42 USC § 1981(c) protects against impairment of civil rights, including that specifically by nongovernmental discrimination. 42 USC § 1988(a) provides for necessary extension of law at equity to achieve said protection, even where the object is not reached by statute. It would seem that where First and Fourteenth Amendment rights and liberties have been compromised to the degree, as regards Petitioners, in Bemidji, Park Rapids and the other stated areas, as alleged and as shown by the record, equitable relief would, under these statutes, lie to compensate for the damages done, and to prevent continuation of same. For

this reason, also, the District Court erred in dismissing said allegations.

Dated: October 28th, 2001
Respectfully Submitted,



Adam Steele, Petitioner, pro se and on behalf of
Northern Herald Publications, Inc., as CEO thereof

## APPENDIX

### I. OPINION OF THE UNITED STATES COURT OF APPEALS ENTERED IN CONJUNCTION WITH THE JUDGMENT SOUGHT TO BE REVIEWED:

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-3348MN

On Appeal from the United States District Court
for the District of Minnesota.

Adam Steele,

Appellant,

Northern Herald Publications, Inc., a Minnesota corporation,

Plaintiff,

v.

City of Bemidji, a municipal corporation; Alan Felix, individually and as City Attorney for the City of Bemidji, Minnesota; Phil Shealy, individually and as City Manager of the City of Bemidji, Minnesota; Michael Porter, individually and as an officer of the Bemidji Police Department; Jon Hunt, individually and as an officer of the Bemidji Police Department; Robert Tell, individually and as Chief of Police of the City of Bemidji, Minnesota; Tim Faver, individually and as County Attorney, County of Beltrami, Minnesota; David Frank, individually and as Assistant County Attorney, County of Beltrami, Minnesota; Lynette Russell, also known as Lynette Rex, an individual; Rich Johanneson, individually; Joseph Leuken, doing business as Leuken's Food Stores; William Batchelder,

individually; Terry Smart, individually; Forem Communications Company, a North Dakota corporation; Omar Forberg, individually; Petro Pete's, the elusive and evasive entity which is doing business as Petro Pete's Park Rapids; Kitty Lemer, individually; County of Beltrami, State of Minnesota; Developers' Diversified Realty Corporation, doing business as Paul Bunyan Mall, Bemidji, an Ohio corporation; Johanneson's, Inc., a Minnesota corporation; Steve Michaels, doing business as Superamerica of Park Rapids; J & B Foods, Inc., a Minnesota corporation; Ron Dargis, doing business as Ron's Foods, doing business as Festival Foods; Cooperative Sampo, doing business as Cenex, Park Rapids, Inc., a Minnesota corporation; Jeff Wizner; Mrs. Jeff Wizner, doing business as Countryside Restaurant, Blackduck, Minnesota; Jackie Hall, doing business as Countryside Restaurant of Bemidji, Minnesota; Judy Black, doing business as Maid-Rite Cafe Bemidji, Minnesota; Shari Mistic, doing business as Southside Restaurant, Bemidji, Minnesota; Tim Saga, individually; Saga of Bemidji, doing business as Highway Host Restaurant, Bemidji, Minnesota, Inc., a Minnesota corporation,

Appellees.

Submitted: May 1, 2001
Filed: July 30, 2001

Before MORRIS SHEPPARD ARNOLD, RICHARD S. ARNOLD, and FAGG, Circuit Judges.

RICHARD S. ARNOLD, Circuit Judge.

Adam Steele appeals the District Court's adverse grant of summary judgment as to some claims, and the dismissal of other claims, in this suit brought under 42 U.S.C. §§ 1983, 1985, and 1986; the Sherman Antitrust Act; and state law.

We affirm in part and reverse in part.

Steele and Northern Herald, Inc., filed an amended complaint naming the City of Bemidji, City Attorney Alan Felix, City Manager Phil Shealy, Chief of Police Robert Tell, and Police Officers Michael Porter and Jon Hunt (the "City defendants"); the County of Beltrami, County Attorney Tim Favor, and Assistant County Attorney David Frank (the "County defendants"); and twenty-one private individuals and businesses (the "non-government defendants"). Viewed in the light most favorable to plaintiffs, the record establishes the following.

The Northern Herald is a periodical containing political reporting, other news, and advertising. Plaintiffs publish the Northern Herald and have three means of distribution: for-profit sales through existing retailers, complimentary distribution, and direct curbside sales on public streets and sidewalks. In February 1998, Steele was distributing papers near a mall, when a police officer ordered him to stop doing so. Steele discussed the matter with the City Manager, who (after a discussion with the Chief of Police) confirmed that Steele could not sell the Northern Herald at that location. After Steele complained to the City, he received a letter from City Attorney Felix stating that Steele's use of public property to "advertise and sell [his] alleged publication" without a solicitation permit and an obstruction permit violated, respectively, City Code sections 6.39 and 10.31. Felix explained that a section 10.31 permit was conditioned upon the provision of adequate insurance and bond, and that in light of Steele's recent bankruptcy, the City was concerned with his ability to provide adequate financial security. Felix warned Steele that the City would require "at a minimum public liability coverage with policy limits equal to those required of the City," and that given Steele's "past history of non-payment, a substantial bond [would be] mandatory." Finally, Felix pointed out that a violation of either ordinance was a misdemeanor and suggested that Steele, find "willing local, private outlets"

to distribute his paper, commenting that "in light of this community's apparent unwillingness to embrace your ideas, another option may be your consideration of relocation to another community ... more willing to embrace your way of thinking."

Several days after receiving Felix's letter, Steele was standing by the sidewalk in front of the Bemidji Post Office—giving away copies of the Northern Herald, and wearing a sign that said "FREE – TODAY ONLY"—when a City police officer threatened to arrest him for "soliciting." Steele responded that he was giving, not selling, the paper; the officer said he would discuss the matter with Felix and then take Steele "to jail, today" if appropriate. Steele stopped distributing the paper and called Felix, who concurred with the police officer because distributing the paper from the sidewalk violated the City's "obstruction" ordinance (even though Steele had been holding all of the copies, and had not deposited them on public property). City officials continued to threaten to arrest Steele if he distributed the paper on public property in the City without first obtaining the requisite solicitation and obstruction permits.

Plaintiffs asserted further in their complaint that, after Steele notified City police of the theft of a stack of complimentary Northern Herald newspapers from a local business, the police merely referred the matter to the County Attorney's Office, which refused to prosecute the theft; that certain named persons and businesses had disrupted distribution of the Northern Herald by refusing to sell the paper, by refusing to allow Steele to leave complimentary copies of it at their businesses, or by threatening to boycott stores that distributed it; and that business owners had denied service to Steele at restaurants and bars, a landlord had threatened a tenant (a friend of Steele's) with eviction if the tenant continued her relationship with Steele, and a printing press refused to print the Northern Herald.

Upon defendants' motions to dismiss or for summary judgment, the District Court held that (1) Steele (a non-

lawyer) could not represent the Northern Herald in these proceedings; (2) Steele failed to state a claim against the non-government and County defendants; and (3) City defendants were entitled to summary judgment because the City ordinances were constitutional, and because the individual City defendants were entitled to qualified immunity. See Steele v. City of Bemidji, 114 F. Supp. 2d 838 (D. Minn. 2000). This appeal followed, in which we review de novo both the District Court's grant of the motions to dismiss and its grant of summary judgment. See Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 557 (8th Cir. 1998); Dulany v. Carnahan, 132 F.3d 1234, 1237 (8th Cir. 1997).

At the outset, we agree with the District Court that Steele may not represent Northern Herald in federal court. See Knoefler v. United Bank of Bismarck, F.3d 347, 348 (8th Cir. 1994) (non- lawyer has no right to represent another entity in federal court). Therefore, we will review the District Court's rulings only as to Steele's individual claims. And, although Steele argues on appeal that be should have been allowed to amend his complaint, he cannot fault the District Court for failing to grant him leave to amend when he did not seek permission to do so.

Turning to the merits of Steele's action, we agree with the District Court that Steele cannot maintain an action against the non-government defendants under sections 1983, 1985, or 1986, see Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 268-69 (1993) (conspiracy actionable under § 1985 must be motivated by class-based animus; persons who wish to engage in constitutionally protected conduct are not a class for § 1985 purposes); Brandon v. Lotter, 157 F.3d 537, 539 (8th Cir. 1998) (to be liable under § 1986, defendant must have neglected or refused to prevent a § 1985 conspiracy); Parker v. Boyer, 93 F.3d 445, 448 (8th Cir. 1996) (§ 1983 redresses only injuries caused by exercise of some right or privilege created by state, by rule of conduct imposed by

state, or by person for whom state is responsible). We reject Steele's argument that the mall is a state actor insofar as it reported Steele's activities to the police, see Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (to be considered state actor, private party must have "reached an understanding" with state officials to deny civil rights and have been "willful participant in joint activity with the State"). Further, defendants are not liable for the single instance of failing to prosecute the theft of copies of the Northern Herald. See Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 694 (1978) (municipality is liable under § 1983 only for unconstitutional custom or policy); Imbler v. Pachtman, 424 U.S. 409, 431 (1976) (absolute immunity protects prosecutor from damages based on decision not to prosecute).

Steele also contends, as he did below, that the non-government defendants' alleged "boycott" is per se illegal under the Sherman Antitrust Act. We disagree. A boycott is a narrow category of per se violation "limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." See FTC v. Ind. Fed. of Dentists, 476 U.S. 447, 458 (1986). Steele, moreover, has not shown an antitrust injury, see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89 (1977) (antitrust laws protect competition not competitors; private plaintiff must show injury reflecting anticompetitive effect either of violation or of anticompetitive acts made possible by violation), and he does not have standing to raise any possible claims by the Northern Herald in this regard. We also agree with the District Court that the boycott does not constitute wrongful activity upon which Steele could predicate a state-law claim for malicious interference with a business relationship. See Hunt v. Univ. of Minn., 465 N.W.2d 88, 95 (Minn. App. 1991) (claim for interference with prospective business relationship lies where defendant intentionally committed wrongful act that improperly interfered with prospective

relationship).

As to Steele's First Amendment challenge, the parties agree that his claims turn on the constitutionality of the City ordinances. Section 6.39 prohibits any "peddler, business solicitor, contribution solicitor ... or transient merchant" from engaging in "any such business" without obtaining a permit. To obtain a permit, an applicant must provide, among other things, his name; date of birth; physical description and photograph; address; a description of "the nature of the business and goods to be sold"; the length of time for which the right to do business is desired; two references to certify the applicant's "good character," or other evidence of good character and business responsibility; a statement of whether the applicant was convicted of any crimes; and fees as established by the City Council. After conducting any investigation deemed necessary, the Chief of Police, within five days, must certify that the applicant's good character and business reputation is "satisfactory" or state his reasons for denying the permit. An applicant can appeal the Chief of Police's denial to the City Council, although the ordinance does not specify standards for the Council's review. If the Chief of Police endorses the application, it is put on the agenda for the City Council's consideration at its next meeting. Upon Council approval, the applicant must submit a $1,000 bond or certified/cashier's check before receiving a permit. The permit expires sixty days after issuance.

Section 10.31 makes it unlawful for anyone to "place, deposit, display or offer for sale any fence, goods or other obstructions upon, over, across or under any public property without first having obtained a written permit from the Council." Before granting any permit, the Council "may impose such insurance or bonding conditions thereon as it, considering the projected danger to public or private property or to persons, deems proper." The ordinance does not specify how soon the Council must consider a permit application, nor does it state the duration of the permit.

Neither ordinance on its face proscribes giving away newspapers that the donor is holding while standing on a City sidewalk. Nevertheless, the City has applied, and apparently wants to continue to apply, the ordinances to Steele, whether or not he attempts to sell his newspapers and whether or not he places them on City property. The City's permit schemes are prior restraints on protected speech, but the City argues – and the District Court agreed – that they are constitutional as valid time, place, and manner restrictions. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (government may impose content-neutral time, place, or manner restrictions so long as they are narrowly tailored to serve significant government interest and leave open ample alternative channels for expression). But in our view, several salient features of the permit schemes run afoul of the First Amendment.

First, the permit schemes vest the City Council with too much discretion to discriminate against disfavored speech or unpopular speakers. See City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 755-59 (1988) (licensing scheme giving government unlimited discretion is facially unconstitutional; mere existence of such discretion, combined with power of prior restraint, intimidates speakers into censoring themselves even if discretion and power are never actually abused); Shuttlesworth v. City of Birmingham, 394 U.S. 147,149-50 (1969) (invalidating ordinance requiring city commission to issue permit unless in "its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience required that it be refused"). Also problematic is the solicitation permit's duration of only sixty days: a person might well be reluctant to distribute a newspaper criticizing a city council that has the unfettered discretion every two months to deny the person's right to distribute his product in public. See Lakewood, 486 U.S. at 758 (expressing similar concerns about city's year- long newsrack permits). Morever, the

solicitation ordinance allows the Chief of Police to deny any permit application under the vague ground that the applicant is not of "good character and business reputation." See Staub v. City of Baxley, 355 U.S. 313, 321 (1958) (invalidating ordinance because of unfettered discretion granted mayor, who was empowered to deny permits to applicants requesting permission to solicit others to join their organization, based on "the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens of the City of Baxley"); Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147 (1939) (invalidating ordinance allowing police chief to deny permit to door-to-door solicitor if he determined applicant was "not of good character").

Second, section 6.39 requires a $1,000 bond or certified check before the applicant can receive a solicitation permit, and a section 10.31 obstruction permit is subject to "such insurance or bonding conditions" as the City Council may impose considering the projected danger to public or private property or to persons." In this regard, Felix's letter stated that Steele would need "a substantial bond" and "public liability coverage with policy limits equal to those required of the City." These requirements cannot be imposed as a prior restraint on protected speech. See Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 133 (1992) (parade fee of "up to one thousand dollars for each day" was unconstitutional because ordinance did not articulate any standards for fixing amount of permit fee and allowed administrator to examine content of prospective speaker's message in assessing fee); cf. Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105,113-14 (1943) (ordinance charging flat fee per day for license to canvass or solicit was unconstitutional because "the license tax [wa]s fixed in amount and unrelated to the scope of the activities of

petitioners or their realized revenues").

Third, neither ordinance imposes a time limit on the City Council's decision to grant or deny a permit. See Riley v. Nat'l Fed'n of the Blind of N.C. Inc., 487 U.S. 781, 802 (1988) (regulation prohibiting speech until speaker obtains license must provide that licensor will "within a specified brief period, either issue a license or go to court") (citation and internal quotation omitted).

Accordingly, we reverse the District Court's grant of summary judgment as to Steele's First Amendment claims against the City defendants. We leave the question of qualified immunity to the District Court on remand. In all other respects, we affirm the judgment of the District Court.

A true copy.

Attest: CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

## II. CONSTITUTIONAL AND STATUTORY PROVISIONS

A. The First Amendment to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

B. The Fourteenth Amendment to the United States Constitution:

Section 1.: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

....

Section 5.: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

C. Title 42, United States Code, Section 1981:

"§ 1981. Equal rights under the law

"(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

"(b) 'Make and enforce contracts' defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and

termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

"(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

D. Title 42, United States Code, Section 1983:

"§ 1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

E. Title 42, United States Code, Section 1985 (3):

"(3) Depriving persons of rights or privileges.

"If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor

of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

F. Title 42, United States Code, Section 1986:

"§ 1986. Action for neglect to prevent conspiracy

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [42 USCS § 1985], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action, and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after

the cause of action has accrued."

G. Title 42, United States Code, Section 1988:

"§ 1988. Proceedings in vindication of civil rights

"(a) Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district and circuit courts [district courts] by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

"(b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer

shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

"(c) Expert fees. In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of sections 1977 or 1977A of the Revised Statutes [42 USCS §§ 1981 or 1981a], the court, in its discretion, may include expert fees as part of the attorney's fee."

H. Title 15, United States Code, § 1:

"§ 1. Trusts, etc., in restraint of trade illegal; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

I. Title 15, United States Code, Section 15 (relevant portions):

"§ 15. Suits by persons injured

"(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. ..."

J. Federal Rules of Civil Procedure, Rule 23.1:

"Rule 23.1. Derivative Actions by Shareholders

"In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

K. Title 28, United States Code, Section 1653:

"§ 1653 Amendment of pleadings to show jurisdiction

"Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

L. Title 28, United States Code, Section 1654:

"§ 1654. Appearance personally or by counsel

"In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the

rules of such courts, respectively, are permitted to manage and conduct causes therein."

## III. OTHER RELEVANT MATERIAL

### A. Para. V.-VII. of Affidavit of Adam Steele Accompanying Combined Memorandum in Opposition to Motions to Dismiss, of June, 2000

"V. That in early January 1998, I received a telephone call from a person who identified himself as William Batchelder and whose voice I recognized as same. Defendant William Batchelder is the nephew of Richard Morton, about whom an article had (then) recently appeared in Northern Herald. In said telephone conversation, said Batchelder informed me of numerous efforts by groups of people in Bemidji to suppress and damage the business of the Northern Herald there. He spoke of one group calling retailers, and another calling advertisers. He further spoke of some persons considering physical violence in retaliation for the article about Richard Morton but said that he'd advised them to use "lawful" means

"VI. At other times since, I have been approached by said William Batchelder, and he has spoken to me, with particularly specific information regarding the progress of the concerted boycott and other attempts to suppress the Northern Herald newspaper. For example, said Batchelder approached me, at the Bemidji post office, speaking of the theft by Defendant Lynette Rex of a stack of our copies, only days after the theft occurred.

"VII.Said Defendant William Batchelder stated to me, by telephone, that he had spoken with key employees of The Pioneer newspaper (owned by Defendant FORUM COMMUNICATIONS, INC.) just prior to Defendant Omar Forberg contacting Plaintiffs to inform them that The Pioneer would no longer do business (i.e. printing) with Plaintiffs."